

**CLIFFORD NELSEN**  
Claimant

**MID-STATE ARMATURE WORKS**  
Respondent

**CIGNA**  
Insurance Carrier

This is a review and modification proceeding. The Administrative Law Judge awarded the claimant a 73 percent work disability for the time period between June 12, 1999, and April 20, 2000. The claimant was unemployed during that time period and the Administrative Law Judge concluded claimant had engaged in a good faith effort to obtain employment. Accordingly, the Administrative Law Judge determined claimant sustained

a 100 percent wage loss which combined with a stipulated 46 percent task loss for a 73 percent work disability.

After the claimant secured employment on April 20, 2000, the parties are in agreement that claimant is owed no additional compensation.

The issues raised on review and briefed by the respondent include the nature and extent of disability and the manner of calculation of benefits due and owing if there is a change in the claimant's disability.

The claimant contends the Administrative Law Judge's Award should be affirmed.

### **FINDINGS OF FACT & CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The Board finds that the Administrative Law Judge's findings of fact and conclusions of law contained in his award are accurate and appropriate. The Board concludes there is no need to reiterate those findings and conclusions in this Order. Therefore, the Board adopts the Administrative Law Judge's findings and conclusions as its own.

Briefly restated, on October 25, 1996, the claimant received an award based upon a 73 percent work disability which included a 100 percent wage loss. The claimant later returned to work and respondent filed for review and modification because claimant was earning wages and no longer had a 100 percent wage loss. On April 3, 1998, the parties entered an Agreed Award based upon a 28 percent work disability. On May 11, 1998, the claimant sought additional medical treatment for his work-related injury which ultimately resulted in surgery. The claimant was off work for 21 weeks following surgery, during which interval he received temporary total disability compensation. The claimant was released from treatment on June 11, 1999. Because he was again unemployed the claimant filed the instant proceeding on July 2, 1999, seeking review and modification.

Initially, the respondent contends that claimant did not make a good faith effort to secure employment. If it is determined that a worker has made a good faith effort to find appropriate employment, the difference in pre- and post-injury wages based on the actual wages can be made. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based on all the evidence, including expert testimony concerning the capacity to earn wages. *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369, (1999) *rev. denied* 269 Kan. 931 (2000).

Following his release from treatment on June 11, 1999, the claimant began a job search which culminated in his securing employment with a Kwik Shop on April 20, 2000.

Upon his release to return to work the claimant testified that he searched for employment on a constant basis. He sought employment as a bartender because he is an experienced bartender. His job search also included checking the want ads on a daily basis, checking with Job Services on a weekly basis and checking with Manpower on an almost daily basis. The evidentiary record supports the Administrative Law Judge's finding that claimant engaged in a good faith effort to obtain employment. As noted in the Board's previous Order in this claim, if respondent were concerned about the level of effort claimant was putting forth towards finding work or his approach to locating and following up on employment opportunities, respondent had the option to provide job placement services. It did not choose to do so.

The Board affirms the Administrative Law Judge's finding that claimant had a 100 percent wage loss for the time period following his release from treatment by Dr. Eyster until he obtained employment on April 20, 2000. The parties stipulated that after his surgery the claimant had a 46 percent task loss. Combining the stipulated 46 percent task loss with the 100 percent wage loss results in a 73 percent work disability.

The primary issue briefed and argued to the Board was whether the claimant is entitled to additional permanent partial disability compensation. The respondent contends that application of prior Board decisions regarding the calculation of benefits when the disability changes limits the claimant to no further compensation. The Board disagrees with respondent's interpretation of its prior decisions on this issue.

As demonstrated by this case, there are frequently periods of time when the percentage of a claimant's disability changes. The reform legislation enacted in 1993 changed the method used to calculate the weekly benefit payable but did not address how to calculate benefits payable for an injury when the disability rate changes for one injury.

Such a change may occur from review and modification or as a part of the initial award when, for example, the claimant ceases to work or returns to work after being off for a period. The award may change from functional to work disability or vice versa. The wage prong of the work disability test and consequently the percentage of work disability may change. Under the pre-1993 calculation, a change in the disability rate meant a change in the weekly rate for the remaining weeks. The calculation used for injury after July 1, 1993, does not lend itself so easily to a change.

There are several possible methods for calculating the award when there is a change in the disability rate. After considering the various options, the Board concluded the most equitable method is to calculate the award, or recalculate the award if benefits have already been paid based on a different disability rating, using the new or latest disability rate as though no permanent partial benefits had been paid or were payable under any earlier disability rate. The award so calculated gives the total number of weeks and amounts payable for the award. If permanent partial benefits have previously been paid, based on a different rate of disability, respondent is entitled to a credit for those

payments. If the rating goes down, as when the claimant returns to work after being off for a period of time, and the new calculation on the new rating results in fewer weeks than respondent has previously paid, respondent owes nothing more. If the disability rate goes up, as when the claimant is laid off, the new work disability rating is calculated based on 415 weeks (less deduction for temporary total paid over 15 weeks) and the number of weeks of permanent partial benefits paid based on the lower rating is credited against amounts due. The last disability rating or amounts already paid or payable, if higher, become the ceiling on benefits awarded. This method of computation was affirmed by the Kansas Court of Appeals in *Wheeler v. Boeing Co.*, 25 Kan. App. 2d 632, 967 P.2d 800 (1998), *rev. denied* 266 Kan. 1116 (1999), and further explained in *Deist v. Dillon Companies, Inc.*, WCAB Docket No. 213,485 (December 1999).

Respondent argues that application of the Board's method of calculation results in no additional compensation because the amount of permanent partial disability compensation already paid exceeds any amount due under the recalculation for the work disability the claimant incurred after he became employed at Kwik Shop.

The respondent takes certain language in prior Board decisions out of context to conclude that only the last disability rating is controlling. During the time period encompassed by this review and modification proceeding the claimant's work disability increased to 73 percent and then decreased to 31 percent. Respondent's contention that only the last disability rating is controlling would ignore interim changes that might occur, such as demonstrated by this claim. Simply stated, after every change in the percentage of disability, a new calculation is required to determine if additional disability weeks are payable. If so, the claimant is entitled to payment of those additional disability weeks until fully paid or modified by a later change in the percentage of disability.

As previously noted, the Board's calculation method requires for each change in the percentage of disability the award is calculated as if the new percentage was the original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

Initially a payment rate must be determined, which in this case is calculated by multiplying the \$315.63 average gross weekly wage by .6667. K.S.A. 44-510e(a)(1) (Furse). Such calculation computes to a payment rate of \$210.43.

The next step is to determine the number of disability weeks payable by subtracting from 415 weeks the total number of weeks temporary total disability compensation was paid. The first 15 weeks of temporary total disability compensation is excluded. The remainder is multiplied by the percentage of permanent partial general disability. K.S.A. 44-510e(a)(2) (Furse).

Herein, the parties stipulated that 42.28 weeks of temporary total disability compensation had been paid. This total includes the temporary total disability

compensation paid following the most recent surgery performed by Dr. Eyster. Accordingly, 27.28 weeks ( $42.28 - 15 = 27.28$ ) would be subtracted from 415 weeks and the remainder of 387.72 ( $415 - 27.28 = 387.72$ ) would be multiplied by the 73 percent permanent partial general disability. Such calculation results in 283.04 disability weeks payable.

The respondent is entitled to a credit for the number of permanent partial disability weeks previously paid. Herein the parties stipulated that claimant had been previously compensated for 148.42 weeks of permanent partial disability. Accordingly, when the claimant's disability increased on June 12, 1999, to a 73 percent work disability, at that point in time claimant was entitled to an additional 134.62 weeks of disability compensation.

When claimant obtained employment on April 20, 2000, his work disability decreased to 31 percent and another calculation of his award was required. Applying the same calculations aforementioned results in a finding that the disability weeks under the new percentage of disability results in a sum of 120.19 disability weeks payable. Because claimant had already been compensated for more permanent partial disability weeks than that sum, the claimant is not entitled to additional compensation from that date forward unless the claimant's percentage of disability is again modified to provide additional weeks of disability compensation.

In summation, when the claimant's percentage of permanent partial general disability changed to a 73 percent work disability on June 12, 1999, a recalculation of his award resulted in a finding that he was entitled to an additional 134.62 disability weeks of compensation. When the claimant's percentage of permanent partial disability decreased to 31 percent after April 20, 2000, the claimant was entitled to no additional disability weeks of compensation. Nonetheless, for the 44.86 weeks between June 12, 1999, and April 20, 2000, the claimant was entitled to compensation at the rate of \$210.43 or \$9,439.89. The Administrative Law Judge's Award of an additional \$9,439.89 of permanent partial disability compensation is affirmed.

Lastly, at oral argument the respondent raised an issue, not presented to the Administrative Law Judge nor briefed to the Board, that the statutory provisions for review and modification in K.S.A. 44-528(b) provide a different standard for determining the extent of permanent partial general disability than the standard established in K.S.A. 44-510e(a).

The same argument regarding the different statutory standards in K.S.A. 44-528 and K.S.A. 44-510e for determining the extent of permanent partial general disability was made in *Asay v. American Drywall*, 11 Kan. App. 2d 122, 715 P.2d 421 (1986). The Court concluded that where there is a conflict between two statutes which cannot be harmonized, the later legislative expression controls.

Although the statutory standard for the determination of the extent of permanent partial general disability that is provided by K.S.A. 44-510e has been amended by the

legislature since the decision in *Asay*, the rationale of the case that the later legislative expression controls is still applicable to any conflict between the current provisions of K.S.A. 44-528(b) and K.S.A. 44-510e(a). The Board concludes that in a review and modification proceeding the determination of the extent of permanent partial general disability is controlled by K.S.A. 44-510e(a) and the case law interpretations of that statute.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 23, 2000, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John Ostrowski, Attorney for Claimant  
Vincent Burnett, Attorney for Respondent and Insurance Carrier  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director